Supreme Court, U.S.
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No. 08-___ 09109

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IN THE

Supreme Court of the United States

GERALD WILLIAM CARDINAL,

Petitioner,

v.

LINDA METRISH,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, provides an express private right of action to "obtain appropriate relief against a government," *id.* § 2000cc-2. Exacerbating a circuit split, the Sixth Circuit held that the Eleventh Amendment precludes awards of compensatory damages under this provision against states and state officials in their official capacities. The question presented is:

Whether states and state officials in their official capacities may be subject to suit for damages for violations of the Religious Land Use and Institutionalized Persons Act?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gerald William Cardinal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 564 F.3d 794. The district court's opinion (Pet. App. 19a-27a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2009. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

I. Constitutional Provisions

The Eleventh Amendment to the United States Constitution, U.S. CONST. amend. XI, provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

II. Statutory Provisions

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), provides, in relevant part:

Section 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

Section 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial

proceeding and obtain appropriate relief against a government.

* * * * *

Section 2000cc-5. Definitions

In this chapter:

* * * * *

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law . . . .

* * * * *

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

STATEMENT OF THE CASE

Petitioner, a prison inmate, brought this suit against Warden Linda Metrish in her official capacity, seeking monetary damages for violations of his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5 (2000). In acknowledged conflict with the Eleventh Circuit, the Sixth Circuit held that although RLUIPA's statutory text supported damages claims against states and state officials in their official capacities, the Eleventh Amendment foreclosed such relief.

1. RLUIPA is a civil rights law designed to protect against religious discrimination, unequal religious accommodations, and unjustified infringement of the free exercise of religion. Section 3 of the Act applies to any state prison that "receives Federal financial assistance," *id.* § 2000cc-1(b), and directs that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," *id.* § 2000cc-1(a), unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest, *id.* §§ 2000cc-1(a)(1) and (2). "[R]eligious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A).

Congress enacted RLUIPA's institutionalized persons provision in response to substantial evidence, collected during three years of hearings, indicating that persons institutionalized in state facilities face "'frivolous or arbitrary' barriers" to their religious

exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (citation omitted); *see also* H.R. Rep. No. 106-219, at 9-10 (1999) (describing one prison's taping of confession between priest and penitent, and another prison's refusal to provide Jewish prisoners with unleavened bread during Passover, "essentially forcing all Jewish inmates to violate their sacred religious practices"); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7774-75 (daily ed. July 27, 2000) (summarizing findings); *Protecting Religious Liberty After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess., Pt. 3, at 41 (1998) (*Joint Stmn.*) (discussing discriminatory accommodations).

Based on its investigation, Congress found that, "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Joint Stmn.*, 146 Cong. Rec. at S7775. Concerned that federal funding not contribute to such frivolous, unreasoned, or discriminatory impositions on religious exercise, Congress invoked its Spending Clause authority, U.S. CONST., art. I, § 8, cl. 1, to require the application of RLUIPA's heightened statutory protection for religious exercise whenever a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1).

To ensure effective enforcement of the Act, Congress created an express private right of action, providing that a "person may assert a violation of this

chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The term "government," in turn, is broadly defined to include:

> (i) a State, county, municipality, or other governmental entity created under the authority of a State;
>
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
>
> (iii) any other person acting under color of State law . . . .

Id. § 2000cc-5(4)(A).

2. Petitioner was an inmate at Hiawatha Correctional Facility of the Michigan Department of Corrections (MDOC) at the time of the events at issue in this case. Pet. App. 1a. Because of his "sincerely held belief in Judaism," he is able to eat only kosher foods. Plaintiff's First Amended Complaint ¶ 9, *Cardinal v. Metrish*, No. 2:06-cv-232 (W.D. Mich. Feb. 8, 2007). On March 2, 2005, he was transferred to Kinross Correctional Facility to be placed in disciplinary segregation because the Hiawatha facility lacked disciplinary segregation facilities. Pet. App. 2a. As a matter of policy, the Kinross facility does not serve inmates kosher meals. *Id.* Consistent with this policy, for the next six days the prison refused to provide petitioner with food he could eat. Plaintiff's First Amended Complaint ¶¶ 15-23, *Cardinal*, No. 2:06-cv-232; *see also* Pet. App. 2a. This was despite the fact that he told staff of his religious dietary needs upon his arrival, sent a written message relaying the same information to

respondent, the Warden of both the Hiawatha and Kinross facilities, and made numerous written requests to staff members for kosher foods as simple as "an apple or some kind of vegetable." Plaintiff's First Amended Complaint ¶¶ 15, 19-23, *Cardinal*, No. 2:06-cv-232. Petitioner was finally transferred to a third facility that serves kosher meals to inmates in segregation, but because it took an additional two days for the new facility to provide him a kosher meal, petitioner ultimately was deprived of food for a total of eight days. Pet. App. 2a.

Petitioner filed suit against respondent in her official capacity, alleging in relevant part a violation of his rights under RLUIPA. *Id.* He sought both equitable relief and damages. Pet. App. 5a.

3. Adopting the United States Magistrate Judge's report and recommendation, the district court granted respondent's motion for summary judgment, holding that Michigan's sovereign immunity barred the RLUIPA damages claim, and that the RLUIPA claim for equitable relief was moot because petitioner had been transferred to a facility that served kosher meals. Pet. App. 27a.

4. The Sixth Circuit affirmed. Pet. App. 1a.

After affirming the dismissal of petitioner's claims for injunctive relief as moot, Pet. App. 5a-6a, the court found petitioner's claims for damages barred by the defendant's Eleventh Amendment immunity, Pet. App. 11a-12a. The court began by noting that because petitioner sued respondent in her official capacity, his suit was considered a suit against the State of Michigan for purposes of the Eleventh Amendment. Pet. App. 5a. The court

acknowledged that because RLUIPA clearly conditions receipt of federal prison funding on states' submitting to RLUIPA suits for "appropriate relief," states waive their Eleventh Amendment immunity to such suits by accepting federal funds. *See* Pet. App. 6a. The more difficult question, the court concluded, is whether "appropriate relief" includes monetary damages. *Id.* On that question, the court recognized, there is disagreement among the circuits. Pet. App. 6a-7a.

The court acknowledged that in *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), the Eleventh Circuit had held that Congress validly conditioned receipt of federal funds on a waiver of states' immunity to damages claims under RLUIPA. *See* Pet. App. 7a. On the other hand, the court explained that in *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006), the Fourth Circuit held that although accepting federal prison funds subjected the state of Virginia to RLUIPA's substantive requirements, the statute does not unambiguously condition receipt of those funds on a waiver of immunity to a money damages remedy for violations of the statute. *See* Pet. App. 7a-8a. This view, the court of appeals noted, was subsequently adopted by the Fifth Circuit as well, in *Sossamon v. Lone Star State of Texas*, 560 F.3d 316 (5th Cir. 2009), *petition for cert. filed*, 77 U.S.L.W. 3657 (U.S. May 18, 2009) (No. 08-1438). *See* Pet. App. 9a.

The Sixth Circuit agreed with the Fourth and Fifth Circuits, and held that petitioner's RLUIPA damages claim is barred by the Eleventh Amendment because "appropriate relief" does not clearly and unequivocally condition the state of Michigan's

receipt of federal funds on a waiver of sovereign immunity to monetary damages. Pet. App. 11a-12a.

Judge Clay concurred in the result but dissented from the majority's decision to reach the Eleventh Amendment question, which he believed had not been adequately developed in the district court or briefed on appeal. Pet. App. 15a-18a.

REASONS FOR GRANTING THE WRIT

This case presents the same question as the pending petition in *Sossamon v. Texas,* No. 08-1438. Agreeing with the Fifth Circuit's decision in that case, the Sixth Circuit here held, in acknowledged conflict with the law in the Eleventh Circuit, that the Eleventh Amendment bars money damages claims under RLUIPA. In addition to exacerbating a circuit conflict, this ruling effectively invalidates a key enforcement provision of a federal civil rights law. This Court's review is therefore warranted, either in *Sossamon* or in this case.

1. As discussed in greater detail in the *Sossamon* petition, there is a deep conflict among the circuit courts of appeal over the scope of states' waiver of sovereign immunity to RLUIPA claims by inmates in federally funded state prisons.

As the court of appeals recognized, the Eleventh Circuit has held that by accepting federal funds in light of RLUIPA's authorization of "appropriate relief," states waive their sovereign immunity to damages claims under the statute. In *Smith v. Allen*, the Eleventh Circuit held that RLUIPA's reference to "appropriate relief" "is broad enough to encompass the right to monetary damages" if a plaintiff proves a violation of the statute. *Smith*, 502 F.3d at 1270.

The Eleventh Circuit relied on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), which held that the implied private right of action under Title IX (another Spending Clause statute) included all "appropriate relief," including damages. *Smith*, 502 F.3d at 1270-71; *Franklin*, 503 U.S. at 66, 72-73. The Eleventh Circuit noted that Congress enacted RLUIPA in 2000, against the background of *Franklin*'s direction to lower courts to presume that all appropriate remedies are available, and that this "appropriate relief" included a damages remedy. *Smith*, 502 F.3d at 1271 ("We assume that, when Congress [enacted RLUIPA], it was aware of *Franklin*'s presumption in favor of making all appropriate remedies available to the prevailing party.").

As the Sixth Circuit here described, it joined the Fourth and Fifth Circuits in holding precisely the opposite. These courts have concluded that even if the phrase "appropriate relief" would otherwise be construed to include money damages, the statute is nonetheless insufficiently clear to condition receipt of federal funds on a waiver of sovereign immunity to RLUIPA damages claims. Pet. App. 11a-12a; *Sossamon*, 560 F.3d at 331; *Madison*, 474 F.3d at 131. Moreover, in a recent decision, the Seventh Circuit has now joined suit as well. *See Nelson v. Miller*, No. 08-2044, 2009 WL 1873500, at *14 (7th Cir. July 1, 2009).

2. The conflict between circuits is entrenched, capable of resolution only by this Court. The Eleventh Circuit has denied rehearing en banc in a case conflicting with the Sixth Circuit's decision, *Smith v. Allen*, 277 Fed. Appx. 979 (11th Cir. 2008)

(order denying rehearing) and recently reaffirmed its position, *see Hathcock v. Cohen*, 287 Fed. Appx. 793, 798 n.6 (11th Cir. 2008). The Sixth Circuit, for its part, reached its decision fully cognizant of the contrary authority. Delaying review will only exacerbate, not eliminate, the circuit conflict. The critical analytical debate has already been fully ventilated, with much of the division turning on debates over the meaning of *this Court*'s precedent. Courts in future cases will simply pick a side without further analysis, as the Seventh Circuit recently did. *See, e.g., Nelson*, No. 08-2044, 2009 WL 1873500, at *14. Only this Court can bring the needed clarity to its precedent and provide stabilizing direction to the lower courts.

3. This Court's review is also warranted because the Sixth Circuit's decision effectively held unconstitutional a key enforcement provision of a civil rights law.

The court of appeals did not dispute that the most natural reading of RLUIPA's text—especially in light of *Franklin*'s use of the phrase "appropriate relief" to include damages in the context of another Spending Clause statute—would authorize a damages award against state defendants. But the court held that giving effect to the text so construed would violate the Eleventh Amendment, effectively invalidating an important provision of a federal statute.

This Court has consistently granted certiorari to review decisions declaring federal statutes unconstitutional even when those statutes have far less frequent application than RLUIPA. *See, e.g., United States v. Stevens*, 129 S. Ct. 1984 (2009);

United States v. Morrison, 529 U.S. 598 (2000); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Clinton v. City of New York*, 524 U.S. 417 (1998); *see also* ROBERT L. STERN & EUGENE GRESSMAN, STEPHEN M. SHAPIRO, & KENNETH S. GELLER, SUPREME COURT PRACTICE 264 (9th ed. 2007) ("Where the decision below holds a federal statute unconstitutional . . . certiorari is usually granted because of the obvious importance of the case."). It should do so again here.

4. For the reasons set forth in the *Sossamon* petition, certiorari is also warranted because the decision below is wrong.

The Sixth Circuit correctly recognized that Congress had clearly conditioned receipt of federal prison funding on a state's waiver of sovereign immunity to RLUIPA suits for "appropriate relief." But in holding that the Eleventh Amendment prohibited construing "appropriate relief" to include damages because states lacked notice of that interpretation, the court of appeals contravened this Court's decision in *Barnes v. Gorman*, 536 U.S. 181 (2002). In *Barnes*, this Court considered the scope of remedies available under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 to 12165, and Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a, which, in turn, incorporated the remedies the Court had implied under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7. *Id.* at 185. As explained above, in *Franklin* this Court had held that an implied private right of action under a Spending Clause statute includes all "appropriate relief." Thus, the question in *Barnes* was the same

question presented here—what constitutes "appropriate relief"? *See id.* at 185.

Like the Sixth Circuit here, this Court began with the principle that a remedy constitutes "appropriate relief" only when the state "is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187. But in direct conflict with the decision in this case, the Court then held that "[a] funding recipient is generally on notice that it is subject *not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract*," including "compensatory damages." *Id.* (citations omitted) (emphasis added).

Accordingly, under *Barnes*, states are on notice that by accepting federal prison funding, they are liable for compensatory damages and would be even if RLUIPA was completely silent as to available remedies. That RLUIPA expressly authorizes "appropriate relief" using the exact words *Franklin* had previously construed to include money damages only enhances the notice provided to states that a consequence of accepting federal prison funding is the possibility of suits for damages under RLUIPA.

5. Accordingly, certiorari is warranted to review the Sixth Circuit's conclusion that the Eleventh Amendment precludes an award of damages to petitioner for the violation of his rights under RLUIPA. However, because the same question is presented in the already-pending petition in *Sossamon v. Texas*, the Court may wish to hold this petition pending the disposition of that case. In the alternative, if the Court views this case as a better vehicle for deciding the question presented in both

petitions, it should grant the petition in this case and hold the petition in *Sossamon*.

CONCLUSION

The Court should hold the petition for a writ of certiorari in this case pending its disposition of the petition for a writ of certiorari in *Sossamon v. Texas*, petition for cert. pending, No. 08-1438 (filed May 18, 2009), and then dispose of this case accordingly.

Alternatively, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 23, 2009

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Gerald William CARDINAL, Plaintiff-Appellant,

v.

Linda METRISH, Defendant-Appellee.

No. 08-1562.

April 24, 2009.

OPINION

BERTELSMAN, District Judge. Plaintiff Gerald William Cardinal appeals the district court's grant of summary judgment in favor of the defendant Linda Metrish, the warden where he was incarcerated. The district court dismissed plaintiff's claims alleging an Eighth Amendment violation under 42 U.S.C. § 1983, as well as violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 *et seq*. We AFFIRM.

BACKGROUND

The plaintiff was an inmate confined at the Hiawatha Correctional Facility and a participant in

the kosher meal program. On March 2, 2005, the plaintiff received several misconduct charges and was placed in temporary segregation. Because the Hiawatha facility could only house inmates in temporary segregation for eight hours, the plaintiff was transferred to the Kinross Correctional Facility. Kinross, however, does not serve kosher meals.

While at the Kinross facility, the plaintiff refused the non-kosher meals. On Saturday, March 5, 2005, after the plaintiff refused to eat for 72 hours, the staff contacted Health Services, as required by Michigan Department of Corrections policy. On Monday, March 7, 2005, Defendant Metrish, the warden of both facilities, learned that the plaintiff was refusing non-kosher meals. On March 8, 2005, the defendant transferred the plaintiff to Chippewa Correctional Facility, which provides both kosher meals and temporary segregation.

The plaintiff filed a pro se complaint in the United States District Court for the Western District of Michigan asserting a § 1983 claim against the defendant, in her individual capacity, for a violation of his Eighth Amendment rights, and asserting a violation of RLUIPA against the defendant in her official capacity. The plaintiff sought damages in excess of $10,000 on each claim for the defendant's failure to provide him with kosher food, which resulted in his not eating for eight days.[1] The

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[1] In his amended complaint, the plaintiff alleges that he was denied kosher food for six days at the Kinross facility and that it took another two days to get kosher meals at the new facility. (District Court Docket Entry 20, ¶ 16).

defendant filed a motion for summary judgment. The district court adopted the report and recommendation of the United States Magistrate Judge and granted summary judgment to the defendant. The plaintiff appeals.[2]

ANALYSIS

The District Court did not Abuse its Discretion in Denying Discovery.

We review for an abuse of discretion a district court's decision to enter summary judgment without permitting discovery. *Short v. Oaks Corr. Facility*, 129 F. App'x 278, 280 (6th Cir. 2005). Rule 56(f) of the Federal Rules of Civil Procedure provides the "mechanism for a plaintiff and the courts to give effect to the well-established principle that 'the plaintiff must receive "a full opportunity to conduct discovery" to be able to successfully defeat a motion for summary judgment.'" *Id.* at 281 (quoting *Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004)). Rule 56(f) provides that the plaintiff is required to file an affidavit or motion explaining what material facts he hopes to uncover by the requested discovery. *Id.* If the plaintiff makes only general and conclusory statements in his affidavit regarding the needed discovery, lacks any details or specificity, it is not an abuse of discretion for the district court to deny the request. *Id.*

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[2] The defendant did not file an appellate brief in this matter.

Here, the plaintiff argues that the district court erred in not permitting him to obtain the requested discovery, i.e., production of entries in the Kinross segregation log book from March 2, 2005 through March 8, 2005. The defendant introduced portions of the log book as exhibits in support of her motion for summary judgment. Upon receipt of these materials, the plaintiff filed a Rule 56(f) affidavit with his response to the motion for summary judgment, explaining that he did not know that a log book existed and requesting that the district court order the disclosure of the missing pages. The plaintiff's Rule 56(f) affidavit explained that through the additional discovery he hoped to discover:

> (1) that a staff member logged in an earlier date, reporting to Defendant Metrish that Plaintiff was going without food, (2) to see if Defendant, or someone in her office, contacted segregation staff about Plaintiff, (3) to see if staff logged in how many meals plaintiff didn't have, and (4) to see if segregation staff logged in when they were informed about Plaintiff's kosher food needs.

(District Court Docket Entry 28, ex. 2).

The issue of whether the defendant was notified that the plaintiff was going without food prior to March 7, 2005 goes to the heart of the defendant's defense. Even if there were additional entries in the segregation staff's log book regarding plaintiff's refusal to eat, these entries would not establish that the defendant had been informed of plaintiff's situation. Accordingly, we hold that the district court's order denying the plaintiff's request for additional discovery was not an abuse of discretion.

The Defendant is Entitled to Eleventh Amendment Immunity on the RLUIPA Claim.

Plaintiff seeks monetary damages, as well as declaratory and injunctive relief, asserting that the defendant violated RLUIPA by not providing him with kosher meals while he was incarcerated at the Kinross facility. RLUIPA provides:

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §§ 2000cc-1(a). RLUIPA defines "government" as including States and their agencies and departments, as well as persons acting under color of State law. 42 U.S.C. § 2000cc-5(4)(A). Plaintiff's RLUIPA claim against the defendant, a State official, in her official capacity is considered a claim against the State of Michigan. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). Accordingly, any immunity available to the State is available to the defendant in her official capacity. *Id.*

The plaintiff seeks declaratory and injunctive relief against the defendant for the alleged RLUIPA violation. The plaintiff, however, has been transferred from the Kinross facility to a facility that offers kosher meals. In addition, the Hiawatha

facility has since changed its policy to preclude transferring participants in the kosher meal program to the Kinross facility. Therefore, we find that the plaintiff's request for declaratory and injunctive relief is rendered moot. *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir. 1996) (holding prisoner's claim for injunctive and declaratory relief mooted by his transfer to new facility).

The district court found that the plaintiff's claim for monetary damages against the defendant in her official capacity should be dismissed because the State of Michigan has not waived its Eleventh Amendment immunity to claims for damages under RLUIPA. The plaintiff argues that, by accepting federal funds for its prisons, the State waived its immunity for RLUIPA claims.

By accepting federal prison funds, States consent to provide "appropriate relief" to prisoners who suffer a RLUIPA violation. 42 U.S.C. §§ 2000cc-2(a), 2000cc-1(b)(1) (requiring all states that receive federal prison funds to comply with RLUIPA). RLUIPA provides that "[a] person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The issue before us is whether monetary damages are "appropriate relief" for violations of RLUIPA.

Neither the United States Supreme Court nor this court has ruled on the issue. There is also no consensus among the other Circuits as to whether a State's acceptance of federal prison funds constitutes a waiver of its sovereign immunity as to RLUIPA claims for damages. The Courts of Appeals for the Third, Fourth and Fifth Circuits, along with a district

court from this Circuit, have concluded that the States are immune from claims for monetary damages under RLUIPA. *See Sossamon v. Lone Star State of Texas,* No. 07-50632, 2009 WL 382260, at *7-8 (5th Cir. Feb. 17, 2009) (designated for publication); *Scott v. Beard*, 252 F. App'x 491, 492-93 (3d Cir. 2007); *Madison v. Virginia,* 474 F.3d 118, 122-23 (4th Cir. 2006); *Porter v. Caruso*, No. 1:05-cv-562, 2008 WL 3978972, at *3-7 (W.D. Mich. Aug. 22, 2008), *appeal docketed*, No. 08-2314 (6th Cir. Oct. 14, 2008). *See also Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (holding language in Religious Freedom Restoration Act, similar to that in RLUIPA, permitting suit for "appropriate relief," did not waive federal government's immunity to suits for damages). The Court of Appeals for the Eleventh Circuit, however, takes the opposite view and ruled that a State's receipt of federal prison funds constitutes a waiver of its sovereign immunity for suits seeking monetary damages under RLUIPA. *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007).

In *Madison v. Virginia,* the plaintiff sued the Commonwealth of Virginia, alleging it violated RLUIPA by denying him kosher meals. *Madison*, 474 F.3d at 122-23. The district court held that by accepting federal prison funds, the Commonwealth of Virginia had waived its sovereign immunity for RLUIPA claims, including those for monetary damages. *Id.* at 123. The Court of Appeals for the Fourth Circuit disagreed, stating that, although Virginia consented, by accepting federal prison funds, to be subject to the substantive requirements of RLUIPA, the language of RLUIPA did not expressly and unequivocally extend its waiver of sovereign

immunity to suits seeking monetary damages. *Id.* at 129-33. The court explained:

> State sovereign immunity is among the Constitution's most foundational principles, *see, e.g., Brown v. N.C. Div. of Motor Vehicles,* 166 F.3d 698, 704 (4th Cir. 1999), and we may not "infer that a State's immunity from suit in the federal courts has been negated," *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 99, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). "[T]here can be no consent by implication or by use of ambiguous language." *Library of Congress v. Shaw,* 478 U.S. 310, 318, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986) (quoting *United States v. N.Y. Rayon Importing Co.,* 329 U.S. 654, 659, 67 S. Ct. 601, 91 L. Ed. 577 (1947)). A waiver must be "unequivocally expressed in statutory text." *See Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996). For this reason, general participation in a federal program or the receipt of federal funds is insufficient to waive sovereign immunity. *See Atascadero [State Hosp.v. Scanlon],* 473 U.S. [234,] 246-47, 105 S. Ct. 3142 [(1985)]. Rather, "Congress must make its intention unmistakably clear in the language of the statute." *Hoffman v. Conn. Dep't of Income Maintenance,* 492 U.S. 96, 101, 109 S. Ct. 2818, 106 L. Ed. 2d 76 (1989) (plurality) (internal quotation omitted).

Id. at 129-30.

The Fourth Circuit concluded that "a waiver of sovereign immunity for some type of remedy does not

necessarily extend to suits for damages." *Id.* at 131 (quoting *Webman,* 441 F.3d at 1025). For a waiver of sovereign immunity to extend to claims for monetary damages, the waiver must "unambiguously" extend to such claims. *Id.* (quoting *Lane v. Pena,* 518 U.S. 187, 192 (1996)). Any purported waiver of sovereign immunity will be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane,* 518 U.S. at 192. *See also Gomez-Perez v. Potter,* 128 S. Ct. 1931 (2008) (considering waiver of federal government's sovereign immunity).

Thus, the Fourth Circuit held that RLUIPA's "appropriate relief" language did not unequivocally waive the State's immunity from suit for monetary damages. RLUIPA "makes no reference to monetary relief - or even to sovereign immunity generally." *Madison,* 474 F.3d at 131. Thus, the court concluded that acceptance of federal prison funds under RLUIPA does not waive a State's immunity from suits for monetary damages. *Id.*

Similarly, the Fifth Circuit, finding the Fourth's Circuit's reasoning in *Madison* persuasive, recently held that the "appropriate relief" language contained in RLUIPA was "not sufficiently clear in light of the [Supreme] Court's sovereign-immunity jurisprudence." *Sossamon,* 2009 WL 382260 at *7. Accordingly, the court held that any claim under RLUIPA for monetary damages against the defendants in their official capacity was barred by the State's sovereign immunity. *Id.* at *8.

The plaintiff argues that the Sixth Circuit should adopt the reasoning of the Eleventh Circuit found in *Smith v. Allen.* In *Smith,* the court held that RLUIPA created a private cause of action for "appropriate

relief" against a State that accepted federal prison funds. *Smith,* 502 F.3d at 1269. The Eleventh Circuit, relying on *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), stated that "where Congress ha[s] not given any guidance or clear indication of its purpose with respect to remedies, federal courts should presume the availability of all appropriate remedies." *Smith,* 502 F.3d at 1270. Thus, the *Smith* court concluded that the phrase "appropriate relief" as used in RLUIPA "is broad enough to encompass the right to monetary damages." *Smith,* 502 F.3d at 1270.

We disagree with the Eleventh Circuit's holding that *Franklin* is applicable to a claim against a State for money damages under RLUIPA. *Franklin* did not involve a claim of sovereign immunity. The Supreme Court has recognized that *Franklin* is not per se applicable to all claims against a State, but only to claims in which a State has expressly waived its sovereign immunity. *Lane*, 518 U.S. at 196-97 (finding Congress did not waive federal government's sovereign immunity for monetary damages for claims against it for violations of § 504(a) of Rehabilitation Act of 1973). In *Lane*, the Supreme Court explained:

> Petitioner's reliance on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), . . . is misplaced. In *Franklin*, we held only that the implied private right of action under Title IX of the Education Amendments of 1972 supports a claim for monetary damages. "[A]bsent clear direction to the contrary by Congress," we stated, "the federal courts have the power to award any

> appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.*, at 70-71, 112 S. Ct., at 1035. *Franklin*, however, involved an action against nonfederal defendants under Title IX. Although the Government does not contest the propriety of the injunctive relief Lane obtained, the Federal Government's sovereign immunity prohibits wholesale application of *Franklin* to actions against the Government to enforce § 504(a). As the Government puts it, "[w]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived."

Id.

As discussed above, a finding that a State has waived its sovereign immunity by accepting federal funds must be based on unequivocal language in the statute that makes the waiver unambiguous. Here, RLUIPA does not contain a clear indication that Congress unambiguously conditioned receipt of federal prison funds on a State's consent to suit for monetary damages.

We find the reasoning of the Fourth and Fifth Circuits consistent with the current Supreme Court case law requiring waivers of sovereign immunity to be "unequivocally expressed." *See, e.g.*, *Gomez-Perez*, 128 S. Ct. at 1942-43; *Lane*, 518 U.S. at 192; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 (1992). We hold that, because RLUIPA's "appropriate relief" language does not clearly and

unequivocally indicate that the waiver extends to monetary damages, the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA.

Defendant was Entitled to Summary Judgment on the § 1983 Claim Alleging an Eighth Amendment Violation.

The plaintiff asserted a § 1983 claim against the defendant in her individual capacity for violations of his Eighth Amendment right to be free from cruel and unusual punishment for not providing him with kosher food, which resulted in his not eating for eight days. The Sixth Circuit has held that the deliberate and unnecessary withholding of food that is essential to normal health can constitute the deliberate indifference to medical needs that violates the Eighth Amendment. *See Cunningham v. Jones*, 567 F.2d 653, 656 (6th Cir. 1977).

To establish an Eighth Amendment violation, the plaintiff must show that the defendant acted with deliberate indifference to his basic needs. The Sixth Circuit recently explained:

> In order to hold a prison official liable for an Eighth Amendment violation, a plaintiff must demonstrate that the official acted with "deliberate indifference" to the inmate's safety. *See Watkins v. City of Battle Creek*, 273 F.3d 682 (6th Cir. 2001) (citing *Estelle v. Gamble,* 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). Deliberate indifference is comprised of both an objective and a subjective component. *Farmer v. Brennan,* 511 U.S. 825, 835-57, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). The objective component

> requires that the deprivation alleged be "sufficiently serious," while the subjective component requires a plaintiff to establish that the government officials had a "sufficiently culpable state of mind." *Id.* at 834, 114 S. Ct. 1970.

Farah v. Wellington, 295 F. App'x 743, 749 (6th Cir. 2008). *See also Harrison v. Ash*, 539 F.3d 510, 517-18 (6th Cir. 2008). To establish the subjective component, the plaintiff must establish that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838.

The case at bar is not a case in which the plaintiff was deliberately denied food. Instead, based upon an apparent administrative error, the plaintiff had been transferred to a facility that did not offer a kosher diet. The plaintiff does not allege that he was denied food, but that he was denied kosher food. The evidence establishes that the defendant was first made aware of the plaintiff's situation on Monday, March 7, 2005. In response, she transferred the plaintiff to a facility that provided kosher meals.

The district court correctly held that the plaintiff had not pointed to any evidence that the defendant knew and disregarded an excessive risk to his health or safety. Instead, the evidence established that as

soon as the defendant was made aware of the plaintiff's situation, she instituted a transfer to a facility that could accommodate plaintiff's kosher needs and security level. Thus, the plaintiff did not demonstrate that the defendant failed to act after being made aware of the facts. We hold that the district court correctly granted summary judgment to the defendant on plaintiff's § 1983 claim alleging a violation of his Eighth Amendment rights.

Plaintiff has not Established a First Amendment Violation.

The plaintiff argues that, even though he did not specifically allege such a violation in his complaint, the district court was required, by his pro se status, to consider a § 1983 claim for the violation of his First Amendment rights since the facts alleged were sufficient to assert such a claim. In its April 24, 2008 Order, the district court considered this argument in ruling on plaintiff's motion to amend the court's order entering summary judgment. (District Court Docket Entry 39). The district court found that, even if the plaintiff had asserted a § 1983 claim for a First Amendment violation, the defendant would have been entitled to summary judgment because the defendant was not actively involved in denying the plaintiff kosher meals.

We have held that, even if a plaintiff can prove a violation of his constitutional rights, his § 1983 claim must fail against a supervisory official unless "the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it." *Combs v. Wilkinson*, 315 F.3d 548, 558 (6th Cir. 2002) (quoting *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984)). *See also Copeland v. Machulis,*

57 F.3d 476, 481 (6th Cir. 1995). "At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Combs*, 315 F.3d at 558 (quoting *Hays v. Jefferson County, Ky.*, 668 F.2d 869, 874 (6th Cir. 1982)).

Here, the evidence established that upon learning of the plaintiff's situation, the defendant began procedures to transfer the defendant to a facility that could accommodate his needs. Since the plaintiff does not allege that the defendant was actively involved in the denial of kosher food, we find that the district court's analysis of the issue was correct.

For the reasons discussed above, the judgment of the district court is **AFFIRMED**.

CONCURRING IN PART, DISSENTING IN PART

CLAY, Circuit Judge, concurring in part and dissenting in part. I concur in the majority's holding that the district court did not abuse its discretion in denying further discovery and that Defendant was entitled to summary judgment on Cardinal's § 1983 claims. I also agree that Cardinal's claims for declaratory or injunctive relief are moot because Cardinal has been transferred to a different facility which provides kosher meals, and because the Michigan Department of Corrections has changed its policy to preclude transferring participants in the kosher meal program to facilities that have no such program. I write separately, however, because I do not believe that this is a case in which this Court should decide whether the doctrine of sovereign

immunity bars a plaintiff from recovering monetary damages under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*.

As the majority indicates, RLUIPA states that "[a] person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government[,]" 42 U.S.C. § 2000cc, but courts are split on the issue of whether "appropriate relief" encompasses monetary relief. *Compare Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007) (holding that the phrase "appropriate relief" in RLUIPA encompasses monetary as well as injunctive relief), *and Price v. Caruso*, 451 F. Supp. 2d 889, 895 (E.D. Mich. 2006) (holding that a plaintiff "may have a cognizable claim for monetary damages . . . under RLUIPA"), *with Madison v. Virginia*, 474 F.3d 118, 131 (4th Cir. 2006) (concluding that RLUIPA's "appropriate relief against a government" language "falls short of the unequivocal textual expression necessary to waive State immunity from suits for damages"). Prior to today's decision, this Court, like the Supreme Court, had not expressed an opinion on the matter.

This is not a suitable case for resolving the issue of what constitutes "appropriate relief" under the statute, or more specifically, whether "appropriate relief" should be held to encompass money damages. This is because the factual record is woefully underdeveloped and the briefing of the legal issues is completely inadequate–undoubtedly due in large measure to the fact that Plaintiff is proceeding *pro se* without the benefit of legal representation, and Defendant has failed in its professional

responsibilities to this Court by declining to file the requisite brief on appeal. Inexcusably, the defense's only filing before this Court was a one-page letter brief stating that Defendant would rely upon the district court's decision and the briefs filed before the district court. Cardinal, proceeding *pro se*, attempted to address the sovereign immunity issue in his appellate brief, but his arguments are less than a picture of clarity and Plaintiff acknowledges that he "is substantially limited in law and he has had problems with law library access." (Cardinal's Br. at 1.) The case was submitted on the briefs without oral argument, and this Court was left with little, if any, developed argument as to the propriety of applying the doctrine of sovereign immunity to RLUIPA claims.

Perhaps more importantly, it is not clear to me that Cardinal has raised a cognizable claim under RLUIPA, which states that "no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . ." 42 U.S.C. § 2000 cc-1(a). Beyond asserting that he required and was denied a kosher diet, Cardinal does not describe with any particularity his religious dietary needs, the actual food that was provided to him, and what injuries he actually suffered. The record is devoid of any explanation as to whether *some* of the food served to Plaintiff in the non-kosher prison environment, especially vegetables, might have been consumed by him without violating his kosher dietary restrictions. Nor is it al all clear whether Plaintiff, operating pursuant to the doctrine of "necessity," would have been permitted, in the interest of preserving his health and welfare, to

consume non-kosher food products, where no kosher food was available, without violating his religious tenets. In other words, the record below is woefully underdeveloped. While we are to construe *pro se* petitions liberally in favor of the plaintiff, *see Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999), this record offers very little to support Cardinal's RLUIPA claim or to justify the need to resolve on behalf of the circuit the availability of money damages under the statute.

In view of the constraints presented by the instant case, I would be inclined to instruct the court below to dismiss Cardinal's RLUIPA claim without prejudice and to refrain from addressing whether the doctrine of sovereign immunity bars a plaintiff from recovering monetary relief under RLUIPA. I therefore respectfully dissent with regard to that portion of the majority opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GERALD CARDINAL

v.

LINDA METRISH

2:06-CV-232

OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action on November 14, 2007. The Report and Recommendation was duly served on the parties. The Court has received objections from Plaintiff. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed *de novo* consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

Plaintiff filed suit against Defendant, Linda Metrish, in her individual capacity for violations of

the Eighth Amendment and in her official capacity for violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, *et al.* Plaintiff was confined at the Hiawatha Correctional Facility ("HTF") and was a participant in the Kosher meal program. On March 2, 2005, Plaintiff was issued several misconduct charges and was placed in temporary segregation. Because HTF inmates can only be housed in temporary segregation for eight hours, Plaintiff was placed in temporary segregation at Kinross Correctional Facility (KCF). KCF does not serve Kosher meals, and Plaintiff refused the non-Kosher meals provided to him. After Plaintiff refused meals for 72 hours, KCF segregation staff, pursuant to MDOC policy, notified Health Services on Saturday March 5, 2005, that Plaintiff was refusing meals. Metrish, the warden of HTF and KCF, first learned on Monday March 7, 2005, that Plaintiff was refusing non-Kosher meals and that Kosher meals were not available at KCF. On March 8, 2005, Plaintiff was transferred to Chippewa Correctional Facility where he could receive Kosher meals while placed in temporary segregation.

Plaintiff alleges that Metrish, in her individual capacity, violated the Eighth Amendment. Plaintiff also sued Metrish in her official capacity for violating the RLUIPA. Metrish moved for summary judgment, and the magistrate issued a report and recommendation that the Court grant Metrish's motion for summary judgment on the Eighth Amendment claim. For the RLUIPA claim, the magistrate recommended granting Metrish's motion because Metrish is immune from suit for monetary damages in her official capacity and because

Plaintiff's claims involving equitable relief were mooted by his transfer to a new prison. Plaintiff filed objections regarding both conclusions.

RLUIPA

The RLUIPA provides that:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person–
>
> (1) is in furtherance of a compelling governmental interests; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1. Regarding relief, the statute states that "[a] person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a).

The issue of liability under the RLUIPA remains unresolved in many courts. Courts are split on whether the RLUIPA provides a cause of action against governmental employees in their individual capacity. *Smith v. Allen*, 502 F.3d 1255, 1272 (11th Cir. 2007) (collecting cases); *Madison v. Virginia*, 474 F.3d 118, 130 n. 3 (4th Cir. 2006) (collecting cases). It is unnecessary for the Court to resolve this issue because Plaintiff withdrew his RLUIPA claim against Metrish in her individual capacity. However,

Plaintiff's claim against Metrish in her official capacity is a source of debate as well. Courts are split on whether a plaintiff may sue an individual in his or her official capacity for monetary damages under the RLUIPA. *Compare Smith*, 502 F.3d 1255 (holding that the RLUIPA contains a waiver of sovereign immunity for monetary damages claims), *and Price v. Caruso*, 451 F.Supp.2d 889 (E.D. Mich. 2006) (same), *with Madison*, 474 F.3d 118 (holding that the RLUIPA contains a waiver of sovereign immunity but that the waiver does not extend to monetary damages).

Suits against state officials in their official capacity are treated as suits against the State. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 361 (1991). As such, "the only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses." *Id.*, 112 S.Ct. at 362. Metrish argues that Plaintiff's claim for monetary relief against her in her official capacity is barred by the Eleventh Amendment. Plaintiff, relying on *Price*, 451 F.Supp.2d at 902, responds that the State waived its sovereign immunity by accepting federal funds conditioned on waiver. Plaintiff is correct that "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145 (1985). However, courts "will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464 (1909)).

The statute specifically provides that a person may "assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The statute defines government to include states, state agencies, and any other person acting under color of state law. 42 U.S.C. § 2000cc-5(4). Therefore, the RLUIPA creates a cause of action against the State, and "[b]y voluntarily accepting federal correctional funds, it consented to federal jurisdiction for at least some form of relief." *Madison*, 474 F.3d at 130. Thus, the Court agrees with both the Fourth and Eleventh Circuits that states have waived their sovereign immunity, in some form, for causes of action under the RLUIPA.

However, the difficult and divisive question is whether that waiver extends to monetary damages. This is because "[a] waiver of sovereign immunity for some type of remedy does not necessarily extend to suits for damages." *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1025 (D.C. Cir. 2006). The Supreme Court has articulated several principles for a court to consider when determining whether a waiver of sovereign immunity extends to monetary damages. First, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 2096 (1996). Second, "the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Id.* at 193, 116 S.Ct. at 2097. Third, legislative history is immaterial because "the 'unequivocal expression' of elimination of sovereign immunity that [the Court] insist[s] upon is an expression in the statutory text."

United States v. Nordic Village, Inc., 503 U.S. 30, 37, 112 S.Ct. 1011, 1016 (1992). Thus, if a waiver of sovereign immunity is susceptible to multiple interpretations – one which includes monetary damages and one which does not – the waiver does not extend to monetary damages. *See Id.*, 112 S.Ct. at 1016.

The statute provides that a person may bring a cause of action against the government and obtain "appropriate relief." 42 U.S.C. § 2000cc-2(a). The term "appropriate relief" is susceptible to various interpretations. It is possible to interpret "appropriate relief" to cover all types of relief – both equitable and monetary. "However, another plausible reading is that 'appropriate relief' covers equitable relief but not damages, given Congress's awareness of the importance of sovereign immunity and its silence in the statute on the subject of damages." *Webman*, 441 F.3d at 1026 (construing same phrase contained in the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et al.*). Because this provision is amenable to multiple interpretations which may or may not include monetary relief, the phrase "appropriate relief" is not the type of unequivocal waiver of immunity from monetary damages required. *Madison*, 474 F.3d at 132.

Moreover, the Court is not convinced by the Eleventh Circuit's argument in *Smith*. The *Smith* panel relied on the Supreme Court's opinion in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 112 S.Ct. 1028 (1992). In *Franklin*, the Supreme Court construed what remedies were available for violations of Title IX. The Court reiterated, and relied on, the traditional presumption that courts "presume the availability of all appropriate remedies unless

Congress has expressly indicated otherwise." *Id.* at 66, 112 S.Ct. at 1032. This presumption was in favor of both injunctive and monetary relief. *Smith*, 502 F.3d at 1270. Thus, according to the *Smith* court, because Congress did not specifically exclude monetary damages for violations of the RLUIPA, the term appropriate relief must include them. *Id.* This analysis, however, fails to account for one crucial difference: context. The Supreme Court in *Franklin* was engaging in pure statutory interpretation separate and distinct from any considerations of sovereign immunity. Thus, the Court was neither bound by nor influenced by the principle that waivers of sovereign immunity must be strictly construed in favor of immunity and that waivers must be unequivocal. A generally applicable presumption of statutory interpretation loses its relevance when confronted with contrary principles of law specific to the issue at hand. In the context of waivers of sovereign immunity, those principles are clear: the waiver must unequivocally extend to monetary damages.

Because the RLUIPA does not contain an unambiguous waiver of sovereign immunity for monetary damages, Plaintiff may not state a claim for monetary damages against Metrish for violations of the RLUIPA. Additionally, Plaintiff's claims for equitable relief are moot because Plaintiff has been transferred from the prison where the incident occurred. *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir. 1996). Thus, the Court will grant summary judgment in Metrish's favor on Plaintiff's RLUIPA claims.

Eighth Amendment

Plaintiff also sued Metrish in her individual capacity for violations of the Eighth Amendment. The Eighth Amendment provides a prisoner with the "right not to have prison officials act with deliberate indifference to his health and safety." *LeMarbe v. Wisneski*, 266 F.3d 429, 435 (6th Cir. 2001). However, "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979 (1994). The magistrate recommends that the Court grant summary judgment in Metrish's favor because there is no evidence demonstrating that Metrish was aware of Plaintiff's situation. Metrish was not aware that Plaintiff was refusing meals because they were non-Kosher until Monday March 7, 2007. Upon learning of this, Metrish immediately transferred Plaintiff to a facility that could accommodate his dietary needs. Thus, Metrish neither knew of nor disregarded an excessive risk to Plaintiff's health or safety. Therefore, Plaintiff cannot prevail in his Eighth Amendment claim against Metrish.[1]

Conclusion

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[1] Plaintiff also argues that with further discovery he could prove Metrish was aware that he was refusing meals sooner. However, this assertion appears to be unfounded and is rebutted by the evidence, including an affidavit from Metrish.

Plaintiff's claim under the RLUIPA for injunctive relief is moot because Plaintiff has been transferred. His claim for damages against Metrish in her official capacity for violating the RLUIPA is barred by sovereign immunity. Finally, the Court grants summary judgment in Metrish's favor on Plaintiff's Eighth Amendment claim because there is no genuine issue of material fact that Metrish was aware of and disregarded an excessive risk to Plaintiff's health and safety. Therefore,

IT IS HEREBY ORDERED that the Report and Recommendation of the Magistrate Judge (docket no. 33) is **APPROVED AND ADOPTED**.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (docket no. 22) is **GRANTED**.

This case is concluded.

Dated: March 13, 2008

/s/ Gordon J. Quist

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GERALD CARDINAL

v.

LINDA METRISH

2:06-CV-232

REPORT AND RECOMMENDATION

Plaintiff Gerald Cardinal filed this prisoner 42 U.S.C. § 1983 action against defendant Linda Metrish. Defendant Metrish is the Warden at Hiawatha Correctional Facility (HTF) and Kinross Correctional Facility (KCF). Plaintiff's First Amended Complaint alleges that he is suing defendant Metrish in her individual capacity for violations of the Eighth Amendment and in her official capacity under the Religious Land Use and Institutionalized Persons Act. Plaintiff was confined at the Hiawatha Correctional Facility and was a participant in the Kosher meal program at the facility. Plaintiff was involved in an incident on March 2, 2005, where plaintiff was issued several misconduct charges. As a result of the charges, plaintiff was placed in temporary segregation. HTF

inmates can only be housed in temporary segregation for a maximum of eight hours. Plaintiff was temporarily placed in segregation at KCF pending the result of the misconduct charges. Plaintiff refused his meals at KCF, because they were not Kosher. KCF does not serve Kosher meals. MDOC policy requires staff to report to Health Services when an inmate refuses meals over a 72 hour period. On Saturday March 5, 2005, KCF segregation staff notified Health Services that plaintiff had refused meals. On Monday March 7, 2005, defendant Metrish first learned that plaintiff was refusing meals because he could not receive a Kosher meal at KCF. Plaintiff was transferred to the Chippewa Correctional Facility (URF). After this incident the procedure was changed so that an inmate on an approved Kosher diet who requires a transfer from HTF to a segregation unit will not be transferred to KCF.

Defendant Metrish moves for summary judgment. Summary judgment is appropriate only if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). If the movant carries the burden of showing there is an absence of evidence to support a claim or defense, then the party opposing the motion must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Id.* at 324-25. The nonmoving party cannot rest on its pleadings but must present "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R.

Civ. P. 56(e)). The evidence must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Thus, any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Muhammad v. Close*, 379 F.3d 413, 416 (6th Cir. 2004) (*citing Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994)). However, a mere scintilla of evidence in support of the nonmovant's position will be insufficient. *Anderson*, 477 U.S. at 251-52. Ultimately, the court must determine whether there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. *See also Leahy v. Trans Jones, Inc.*, 996 F.2d 136, 139 (6th Cir. 1993) (single affidavit, in presence of other evidence to the contrary, failed to present genuine issue of fact); *cf. Moore, Owen, Thomas & Co .v. Coffey*, 992 F.2d 1439, 1448 (6th Cir. 1993) (single affidavit concerning state of mind created factual issue).

Plaintiff argues that defendant Metrish, in her official capacity, violated his rights under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1. Section 2000cc-1 states:

> (a) General Rule
>
> > No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person–

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

The Eleventh Amendment bars litigants from suing a state in federal court. When a suit for damages is brought against a state official in his official capacity, the case is one against the state and is barred by the Eleventh Amendment. *Hafer v. Melo*, 502 U.S. 21 (1991). Such a suit "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent." *Id.* at 25 (*quoting Monell v. New York City Department of Social Services*, 436 U.S. 658, 690, n.55 (1978)). *See also Kentucky v. Graham*, 473 U.S. 159, 165 (1985). As a result, the suit is no different from one naming the state itself. *Hafer*, 502 U.S. at 26 *(quoting Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989)). Accordingly, plaintiff is not entitled to damages against defendant Metrish under the RLUIPA. *Farnsworth v. Baxter*, 2007 WL 2793364, slip. op. (W.D. Tenn., Sept. 26, 2007). *See also Berryman v. Graholm*, 2007 WL 2259334 (E.D. Mich, Aug. 3, 2007) (denying claims under the RLUIPA involving the temporary removal of prisoners from the Kosher meal plan). In *Berryman*, the court found that a temporary removal of prisoners' Kosher meals could not substantially burden the practice of Judaism. Further, the court held that no damages were allowable under the Act and the transfer of the prisoners to a new prison mooted all equitable claims. Similarly, in this case, plaintiff has been transferred to a new prison. Plaintiff's claims involving equitable relief should

also be dismissed. *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Henderson v. Martin*, 73 Fed. Appx. 115, 117 (6th Cir. 2003); *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir. 1996).

Plaintiff has also asserted that his Eighth Amendment rights were violated by defendant Metrish because he was denied Kosher meals. The Eighth Amendment imposes a constitutional limitation on the power of the states to punish those convicted of crimes. Punishment may not be "barbarous" nor may it contravene society's "evolving standards of decency." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). The Amendment, therefore, prohibits conduct by prison officials that involves the "unnecessary and wanton infliction of pain." *Ivey v. Wilson*, 832 F.2d 950, 954 (6th Cir. 1987) (per curiam) (quoting *Rhodes*, 452 U.S. at 346). The deprivation alleged must result in the denial of the "minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347; *see also Wilson v. Yaklich*, 148 F.3d 596, 600-601 (6th Cir. 1998). The Eighth Amendment is only concerned with "deprivations of essential food, medical care, or sanitation" or "other conditions intolerable for prison confinement." *Rhodes*, 452 U.S. at 348 (citation omitted). Moreover, "not every unpleasant experience a prisoner might endure while incarcerated constitutes cruel and unusual punishment within the meaning of the Eighth Amendment." *Ivey*, 832 F.2d at 954.

Plaintiff was not denied meals. In fact, he refused the available meals because they were not Kosher. Defendant Metrish asserts that she was not personally involved in plaintiff's placement at KTF or the serving of meals to plaintiff while he was

temporarily housed at KTF. In fact, as soon as defendant Metrish learned that plaintiff was refusing meals and the reason why he was refusing meals, she immediately had plaintiff transferred to a facility which would accommodate his religious requirements and security classification. Under these circumstances, defendant Metrish could not have violated plaintiff's Eighth Amendment rights. It is further noted that plaintiff's assertion that discovery could somehow help him defeat defendant's motion summary judgment is, in the opinion of the undersigned, unfounded.

Accordingly, it is recommended that defendant's Motion Summary Judgment (Docket #22) be granted and this case be dismissed in its entirety.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

Dated: November 14, 2007